

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A.D. 1975

No. **75-5943**

DONALD LAMB,

Petitioner,

-vs-

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

JAMES J. DOHERTY,
Public Defender of Cook County,
Illinois,

By: JOHN THOMAS MORAN,
Assistant Public Defender,
Chief, Appeals Division,
407 Civic Center
Chicago, Illinois 60602
(312) 443-6350

KATHYRN J. KUHLEN,
Assistant Public Defender
1100 South Hamilton Avenue
Chicago, Illinois 60612
(312) 633-2194

Counsel for Petitioner.

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THE STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Your Petitioner, Donald Lamb, respectfully prays that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois affirming over three dissents his adjudication as a delinquent based solely on his statements made to the police while detained for "interrogation."

Opinions Below

On October 16, 1972, following an adjudicatory hearing in the Circuit Court of Cook County, Illinois, County Department, Juvenile Division, Petitioner was found delinquent on a petition alleging the offense of murder. He was committed to the Illinois Department of Corrections, Juvenile Division, on November 29, 1972.

The Appellate Court of Illinois, First District, First Division, affirmed the judgment on August 5, 1974, in an opinion reported at 21 Ill.App.3d 827, 316 N.E.2d 42.

By a 4 to 3 vote, Justices Goldenherish, Schaefer, and Ward dissenting, the Supreme Court of Illinois affirmed the judgment

of the Appellate Court in an opinion reported at 61 Ill.2d 383, 336 N.E.2d 753.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3). The judgment of the Supreme Court of Illinois was entered on September 26, 1975. No petition for rehearing was filed.

Question Presented for Review

Is a confession voluntary when extracted from a 16 year old minor who was illegally detained by the police for 26 hours; fed only twice during that period of time; left sitting overnight, handcuffed to a ring in the hall of a police interrogation room; not afforded counsel and not seen by any parent or relative for at least 19 hours and then not in private; and possibly beaten and threatened with street gang reprisal?

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

The Fifth Amendment to the Constitution of the United States:

"No person . . . shall be compelled in a criminal case to be a witness against himself. . . ."

The due process clause of the Fourteenth Amendment to the Constitution of the United States:

"[N]or shall any State deprive any person of life, liberty or property without due process of law"

Statement of the Case

In the early evening hours of May 25, 1972, Donald Lamb, (hereafter referred to as Petitioner), then 16 years old, was

picked up by the Chicago police for questioning about a homicide which had occurred over a month earlier. He was taken to the Maxwell Street Station on Chicago's West Side and kept in-custody from 6:00 or 8:00 p.m. until 8:30 or 9:30 p.m. the following evening, a total of some 26 hours. (R. 122, 64, 44, 188)^{1/}

The homicide investigators who picked up Donald were acting on information from two "day-watch" investigators that he should be brought into the area and "interrogated." (R. 50) Donald was held in custody from the time he was "picked up" until the taking of a written statement from him the following evening. (R. 66) This was done despite the existence of a statute directing law enforcement officers who take a minor into custody without a warrant to deliver that minor to court or to a court-appointed place of detention "without unnecessary delay." ILL.REV.STAT. ch. 37, § 703-2.

During this period of confinement, Petitioner was left sitting overnight in an interrogation room, handcuffed to a ring in the wall. (R. 130-132) He testified that he was able to sleep only "on and off" during the night. (R. 135) He was not fed at all on the 25th of May. The next morning, after 12 hours of custody, he was asked if he was hungry and given a Polish sausage and pop. (R. 135-6)

Later that morning two officers took Donald to the alley where the homicide had occurred. While sitting in the police car, and after questioning by the police, Donald pointed out what he pretended to be the location where a companion had supposedly struggled with and stabbed the homicide victim. At a pre-trial hearing on the motion to suppress the confession, Donald testified he made up that information. (R. 176-9)

^{1/} References to the state court record are made to the "Report of Proceedings" abbreviated as "R. ___" and to the "common law record" abbreviated as "R.CL ___."

During the afternoon of May 26th, Donald was taken to the State's Attorney's Office and was able for the first time to have a conversation with his mother but not in private. (R. 113-5, 180-1) He was then returned to the Maxwell Street Station.

Petitioner was not fed again until sometime around 9:00 p.m. on the 26th -- and according to Donald, only after he agreed to make a statement. (R. 157) One or more written statements were subsequently taken from Petitioner in addition to oral statements. (R. 36-7, 190, 387)

The length of Donald's detention, the infrequency of his meals, and the fact that he was handcuffed to a ring in the wall of the interrogation room overnight, were all conceded by the police in their testimony on the motion to suppress the confession. Donald testified in addition that on the evening of May 25th, he was hung up for half an hour by handcuffs attached to the bars of a window in the interrogation room. (R. 170) He stated that on the following evening, he was again hung up for his refusal to give a statement that afternoon at the State's Attorney's Office. (R. 183) Donald testified that at this occasion, the police hit him in the stomach and threatened to tell members of a street gang that he was an informer -- in Donald's words: to "put the gang on me." (R. 145-6) Donald said that it was during the course of this beating that he agreed to make a statement and was told what to say by one of the officers. (R. 186-8)

At the conclusion of an evidentiary hearing, the trial court denied Petitioner's motion to suppress the confession. (R. 266) At Donald's trial, the State's only evidence linking him to the crime were the confessions themselves. No witness identified him as being at the scene of the stabbing, no weapon or other physical evidence was introduced to connect Donald to the crime or to corroborate his statements. Testimony given by the State's witnesses

differed in significant respects from the details given by Petitioner in his confessions, and the details Donald himself gave varied from on statement to another.^{2/}

Reasons for Allowing the Writ

The illegal and brutal tactics employed by the Chicago police officers in their efforts to secure a confession from Petitioner are clearly indefensible, and were recognized as such by both Illinois reviewing courts passing on this case. The Supreme Court stated that such tactics "cannot be condoned," (61 Ill.2d 383, 388) and the Appellate Court noted they were "to be severely condemned." (21 Ill.App.3d 827, 835)

In spite of these serious conclusions, the two courts, with justices dissenting in the Supreme Court (Justices Goldenhersh,

2/ A police officer who interviewed the homicide victim at the hospital testified the man stated he was attacked and robbed by four or five youths. (R. 383) Donald said he was with only two other boys, one of whom attacked the man they had encountered. (R. 351, 435-6) An eyewitness to the incident testified that she saw a man struggling with an attacker two houses away from an alley on Trumbull Street. (R. 307-8) Donald stated his companion, Robert Bruce, attacked and stabbed the man while at the mouth of the alley. (R. 352) Furthermore, the victim's wife testified that her husband was brought home wounded at 11:00 or 11:30 p.m. (R. 302) and the police officer who spoke with the victim at the hospital said he did so at 11:20 or 11:30 p.m. (R. 384) Donald, however, stated he was at a dance that evening until 11:20 p.m., after which he went to see his girlfriend at 21st and Trumbull. He stated that the incident at the alley occurred only after he and his companions had left that address at about 11:50 p.m. (R. 436)

The discrepancies in Donald's various statements include the following: (1) One of the police officers who took Donald to Trumbull Street on May 26 testified that at that time Donald told them the man he and his companions had encountered had gotten up from the ground after a struggle with Robert Bruce, said "Don't shoot," and ran. Donald then fired a gun at him. (R. 352) In his written statement, Donald said he fired before the man had gotten up, and had not fired at him but in the air. (R. 443-4) (The victim died of stab wounds; no gunshot wounds were found.) (2) In the Trumbull Street statement Donald referred to the gun as a .22 cal. automatic. (R. 352) In his written statement he said it was a blank gun. (R. 430) (3) Donald told the officers at Trumbull Street that he and Bruce ran away together after the gun was fired. (R. 352) In his written statement he said Bruce ran before the shot was fired and was gone by the time Donald began to run. (R. 444) (4) At Trumbull Street Donald said that while running away, he threw the gun in a gas station on the corner of Ogden and Trumbull. (R. 352) In the written statement he said he put the gun in his pocket, took it home and kept it for a week, after which he put it in an ice bucket. (R. 447-8) (No gun was

Schaefer and Ward), found Petitioner's confessions to have been given voluntarily.

It is submitted that such a holding radically departs from the principles laid down by this Court governing the determination of voluntariness of confessions. Should the opinion of the Supreme Court of Illinois be allowed to stand, every police officer in the state will have license to ignore the most fundamental requirements of due process in extracting confessions from juveniles--a class of persons whose rights should be guarded with the utmost care.

This Court has consistently found that the following factors tend to render a confession involuntary: an illegal detention;^{3/} impaired mental faculties;^{4/} psychological pressures such as fear,^{5/} lengthy interrogation or detention;^{6/} deprivation of the rudiments of life such as food and sleep;^{7/} the youth of the suspect;^{8/} the absence of counsel, friends and relatives;^{9/} physical abuse;^{10/}

^{2/} (continued)
ever recovered.)

It is also significant that Donald's written statement consists mainly of "yes" answers to leading questions. Most of the details were thus supplied by the assistant State's Attorney conducting the interrogation. (R. 408-453)

^{3/} Watts v. Indiana, 338 U.S. 49 (1949); Payne v. Arkansas, 356 U.S. 560 (1958).

^{4/} Payne v. Arkansas, 356 U.S. 560; Fikes v. Alabama, 352 U.S. 191 (1957).

^{5/} Malinski v. New York, 324 U.S. 401 (1945).

^{6/} Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960).

^{7/} Watts v. Indiana, 338 U.S. 49.

^{8/} Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49.

^{9/} Watts v. Indiana, 338 U.S. 49; Blackburn v. Alabama, 361 U.S. 199.

^{10/} Brown v. Mississippi, 297 U.S. 278 (1936).

and threats.^{11/} Each of these factors, with the single possible exception of threats, occurred in this case.

THE ILLEGAL DETENTION

Petitioner was held in police custody 26 hours in violation of a state law providing that a minor arrested without a warrant, if not released, "shall be delivered without unnecessary delay to the court or to the place designated by rule or order of court for the reception of minors." ILL.REV.STAT. ch. 37, ¶ 703-2(1). Indeed, the Illinois Appellate Court specifically found that Petitioner's detention was illegal. 21 Ill.App.3d 827, 835. This flagrant violation of his right to the intervention of neutral court officers signaled to Petitioner that he could place no faith in the police officers' willingness to observe the processes of the law in their dealings with him. See Brown v. Illinois, 422 U.S. ___, 45 L.Ed.2d 416, 427 (1975).

IMPAIRED MENTAL FACULTIES

While there is nothing in the record to indicate that Petitioner's intelligence was below normal, he was not attending school at the time of the court proceedings. (R. 121) Most important to a consideration of his mental acuity, however, is the fact that Petitioner was deprived of adequate sleep during the night of May 25th, when he was made to sit in a chair all night, handcuffed to a ring in the wall of a police interrogation room. Donald testified that he was able to sleep "on and off," but "not that much." (R. 135) Donald's inability to sleep for any length

^{11/} Payne v. Arkansas, 356 U.S. 560 (1958).

of time is scarcely surprising, given the uncomfortable and restrictive posture forced upon him. It is obvious that his mental alertness and decision-making faculties were greatly impaired on the following day when the confessions were taken.

THE PRESSURES OF FEAR AND A LENGTHY DETENTION

The 26 hour period of detention, long for an adult, must have seemed interminable to Donald. Throughout the morning hours of May 26th, Donald doubtlessly grew increasingly apprehensive that he would be forced to spend another night handcuffed to the wall unless he confessed. As this Court noted in Watts v. Indiana, 338 U.S. 49, 52 (1949):

"There is torture of the mind as well as body; the will is as much affected by fear as by force."

Cf. Brown v. Illinois, 422 U.S. ___, 45 L.Ed.2d 416, 428.

Donald clearly must have been in great fear of further brutishness from the police, and it can hardly be doubted that that fear contributed to his eventual submission to the police desire that he confess.

LACK OF PROPER FOOD AND SLEEP

As noted, Donald was deprived of proper sleep during his 26 hour detention. He was also deprived of proper food. He was not fed at all on the evening of May 25. On the morning of May 26, he was given a Polish sausage and pop. He was then not fed again for over 12 hours. (R. 135-6, 142, 157) Obviously, this deprivation of food must have weakened him, lowered his blood sugar, and rendered him less able to resist in the face of interminable police questioning.

THE SUSPECT'S YOUTH

At the time of his arrest, Petitioner was only 16 years old,

and his sole contacts with law enforcement consisted of one juvenile petition which had been dismissed and five station adjustments, four for violation of curfew. (R. 502)^{12/} As this Court pointed out in a case involving a 15 year old, Haley v. Ohio, 332 U.S. 596, 599 (1948): "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." The police tactics employed here, which would have been coercive to an adult, were doubly so to the minor Petitioner.

ABSENCE OF COUNSEL, FRIENDS AND RELATIVES

At no point during his detention did Donald confer with counsel. He did not even see any relatives or friends until 3:00 p.m. on his second day in custody for "investigation." Then he was allowed to speak with his mother but not in private. Secretaries were present and police officers walked in and out. (R. 113-5, 180-1) Donald saw his mother once more later that evening, but again, there were others present in the room. (R. 115) The absence of counsel and consultation with a parent is of course especially destructive to the will in the case of a young person. As the dissenting justices in the Illinois Supreme Court point out, In re Gault, 387 U.S. 1 (1967) mandates that where counsel is absent when an admission is given by a juvenile:

"[T]he greatest care must be taken to insure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U.S. at 55.

Nor does the fact that Donald was advised of his Miranda rights dilute the coercive effect of this absence of counsel, friends and relatives. In Gallegos v. Colorado, 370 U.S. 49 (1962),

^{12/} The "curfew" law, ILL.REV.STAT. ch. 23, ¶ 2371 (1973), was declared unconstitutional by the Appellate Court of Illinois in People v. Chambers, 335 N.E.2d 612 (1975).

the prosecution also argued that the 14 year old defendant's failure to ask for a lawyer or for his parents, despite the fact that he was advised of his right to counsel, demonstrated the voluntariness of his confession. In rejecting that contention, this Court noted:

"[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." 370 U.S. at 54.

Here especially, in the context of all the police abuse under which Donald was suffering, recitation of the Miranda warnings must have seemed more like a sardonic joke than a realistic option which he could freely exercise. See Brown v. Illinois, 422 U.S. ___, 45 L.Ed.2d 416, 427. In such a setting, the warnings cannot be said to dilute the coercive effect of such abusive misconduct. Under this interminable questioning, to paraphrase this Court, "[t]his is a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." Michigan v. Mosley, ___ U.S. ___, 18 Cr.L.R. 3017, 3020 (12/9/75) (Emphasis supplied.)

PHYSICAL ABUSE AND THREATS

Petitioner also claimed to have been hung up by handcuffs fastened to the bars of the window of his interrogation room, punched in the stomach, and threatened with reprisal through a street gang. The police officers who testified at the hearing on Petitioner's motion to suppress his confessions denied these acts of physical

violence. It was admitted, however, that they placed him in a chair on the evening of May 25th, handcuffed him to a ring in the wall of the interrogation room, and left him there all night. The extreme discomfiture of that restricted posture, more restricted than if Donald had been placed in a cell, is evidence that this conduct is as physically abusive as a slap in the face or a punch in the stomach, and is probably more painful and more psychologically effective. Certainly, the denial of washroom facilities is an abuse of the most intimate kind. There is no question that the voluntariness of a confession given by a suspect after he has been physically abused is highly suspect. Brown v. Mississippi, 297 U.S. 278 (1936).

In light of the police actions revealed in the record here, the three dissenting justices in the Illinois Supreme Court found it "difficult to rule out the possibility that the statement was the product of the 'fright or despair' suggested by Gault." 61 Ill. 2d 383, 394. It is submitted that the dissenting justices accurately applied the principles of this Court in reaching that determination, and that the majority opinion failed to use that "special care in scrutinizing the record" mandated for the review of juvenile confessions in Haley v. Ohio, 332 U.S. 596, 599 (1948).

Petitioner requests that that opinion not be allowed to stand unchallenged, thereby serving as precedent for further violations of the rights of juveniles in Illinois.

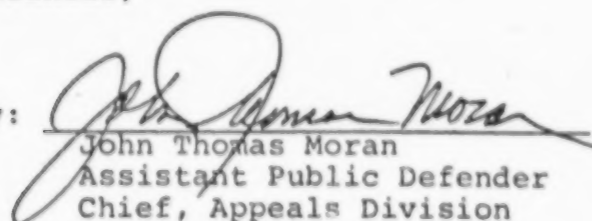
Conclusion

For the reasons urged herein, Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

JAMES J. DOHERTY,
Public Defender of Cook County,
Illinois,

By:


John Thomas Moran
Assistant Public Defender
Chief, Appeals Division

Kathryn J. Kuhlen
Assistant Public Defender

Sept. 1975

IN RE LAMB

383

(No. 47034.—Judgment affirmed.)

In re DONALD LAMB, a Minor.—(The People of the State
of Illinois, Appellee, v. Donald Lamb, Appellant.)

Opinion filed September 26, 1975.

1. CRIMINAL LAW—*legality of arrest should be questioned at trial.* Where the defendant failed to raise the issue of the legality of his arrest in the trial court, he cannot, for the first time on review, claim that his statements made during confinement were the fruits of an illegal arrest. (P. 387.)

2. SAME—*when statement is not shown to have resulted from mistreatment.* A defendant, even though a minor, who was fully informed of his constitutional rights, cannot claim that a written statement made during confinement should be suppressed after a pretrial hearing, where the court's finding that, considering the totality of the circumstances, the statement was voluntary and not the result of mistreatment is clearly not contrary to the manifest weight of the evidence. (Pp. 388-89.)

3. SAME—*what alleged material witnesses to claimed mistreatment need not be called.* An assistant State's Attorney present at the taking of a written confession but not present at alleged mistreatment which defendant claims resulted in his statement is not required to testify at pretrial hearing, nor is the absence of another officer required to be explained where defendant's written motion to suppress did not make clear whether this officer was a material witness. (Pp. 389-92.)

GOLDENHERSH, SCHAEFER, and WARD, JJ., dissenting.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County; the Hon. Richard J. Cooper, Judge, presiding.

James J. Doherty, Public Defender, of Chicago (John Thomas Moran, Assistant Public Defender, and Kathryn J. Juhlen (law student), of counsel), for appellant.

William J. Scott, Attorney General, of Springfield, and Bernard Carey, State's Attorney, of Chicago (James B. Zagel and Jayne A. Carr, Assistant Attorneys General, of Chicago, and Laurence J. Colon and Marcia B. Orr,

Assistant State's Attorneys, and John J. Verscaj (law student), of counsel), for the People.

MR. CHIEF JUSTICE UNDERWOOD delivered the opinion of the court:

Following an adjudicatory hearing in the juvenile division of the circuit court of Cook County which established his commission of the offense of murder (Ill. Rev. Stat. 1971, ch. 38, par. 9-1(a)(2)), respondent, Donald Lamb, 16 years of age, was adjudicated a delinquent minor (Ill. Rev. Stat. 1971, ch. 37, par. 702-2) and committed to the Department of Corrections, Juvenile Division. The Appellate Court for the First District affirmed (21 Ill. App. 3d 827), and we granted leave to appeal.

Oral and written statements made by respondent while in police custody were the only evidence directly implicating him in the killing. After a pretrial hearing, his motion to suppress these statements was denied by the trial court. Respondent argues here that the statements were improperly admitted into evidence because: (1) they were the fruits of an illegal arrest; (2) they were involuntary, having been obtained by physical and mental coercion; and (3) the State failed to produce or explain the absence of all material witnesses to the statements.

Respondent was taken into custody at approximately 8 p.m. on the evening of May 25, 1972, by Officers Soil and Blackley of the Chicago Police Department, who were investigating the murder of Benny Ruffin. The officers acted on the basis of information, not disclosed by this record, provided by the day-watch officers who were working with them on the case. Officers Soil and Hensley testified that upon arrival at the Maxwell Street police station, respondent was placed in a small interrogation room and questioned for a short time by them. One of respondent's wrists was then handcuffed to the wall of the room, and he was left sitting in a chair until 7:30 the next

morning. According to respondent, during his initial interrogation that evening and after he had denied any knowledge of Ruffin's murder, a police officer handcuffed him and hung him by the handcuffs over a window bar in the room so that he was on his tiptoes, leaving him in that position for about one-half hour. When taken down, he was questioned further by Officer Soil and left in the chair all night. He was not questioned or disturbed during the night and was able to sleep off and on. It is uncertain which officer is alleged to have hung him over the window bar since respondent stated on direct examination that it was done by Soil's partner but on cross-examination indicated that it was done by Soil. Soil and Hensley testified that respondent was not mistreated; Blackley did not testify.

At 7:30 a.m. on the morning of the 26th, an officer asked respondent if he was hungry and brought respondent the Polish sausage and pop he requested. After eating, respondent spent the day with Officers Deloughry and Triggs, who questioned him briefly, then took him to the scene of the murder, where later that morning he orally admitted his participation and explained to the officers the details of the crime. After helping the officers locate one of his accomplices, respondent was taken to 26th Street and California Avenue for questioning by an assistant State's Attorney, and then about 5 p.m. was returned to the interrogation room at the Maxwell Street station. Following further questioning by Officer Hensley, respondent again orally admitted his participation in the crime and agreed to make a written statement. Asked if he was hungry, respondent requested a "Big Mac," fries and pop, which he received about 8 p.m. He had apparently had no other food during the day, although he does not contend that he ever requested food and was refused. His written statement was taken by Assistant State's Attorney Gervasi about 9:45 p.m. on May 26 in the presence of Officers Soil, Hensley and Youth Officer O'Driscoll, court

reporter Stabrawa and respondent's mother, Mrs. Delores Lamb. Respondent contends that he was forced to make the written statement by Officers Hensley and Deloughry, who, after his return to the Maxwell Street station, hung him up again on the window bar, hit him in the stomach three times and threatened to frame him so that a street gang would get him. He said that the handcuffs had caused marks on his wrists but that the marks had disappeared by the time of trial. Officers Hensley and Deloughry denied that respondent had been mistreated or coerced into making the statement. Except for Assistant State's Attorney Gervasi, who was not a witness at the suppression hearing, all those present at the written statement, including respondent's mother, testified that his physical condition was normal.

Commencing prior to his initial interrogation, respondent was repeatedly informed of his constitutional rights by all police officers who questioned him and, in the presence of Mrs. Lamb, by Assistant State's Attorney Gervasi prior to the taking of the written statement. There is no doubt that respondent was given an adequate explanation of his rights, and no reason appears to doubt that he understood and waived them. Respondent made no complaint of mistreatment to the assistant State's Attorney, his mother or anyone else present at the taking of the written statement. He claimed that he had told his mother during the afternoon of the 26th of the mistreatment the previous evening, but she made no mention during her testimony of such a conversation nor was she asked about it. His explanation for this omission was that she had probably forgotten their conversation. The written statement states that respondent had not been beaten or abused by police officers, that he had been fed and given cigarettes, and that the statement was not coerced, but was given because it was the truth. After the reporter typed the statement, respondent read it, made several corrections, initialed each page and signed it at the end.

At 10 p.m. on May 25, approximately two hours after respondent was taken into custody, two police officers had gone to his home and informed his mother that he was in custody. She told them that it was too late to go to the station that night. She called the station on the morning of the 26th and was told she should come down and find out what was happening, but she did not do so until almost 3 p.m. that afternoon. She was allowed to talk with her son at 26th and California and again later at the Maxwell Street station prior to the written statement, although it is not entirely clear whether they were ever afforded complete privacy. She testified she told him to tell the truth. She was present during the taking of the written statement, but made no mention of any complaints by her son of mistreatment or of anything unusual about her son's condition and verified as accurate a photograph of respondent, herself, and Assistant State's Attorney Gervasi taken just after the written statement and showing nothing abnormal about respondent's physical condition. Transportation from her home to 26th and California and the Maxwell Street station was provided by the police.

Respondent initially contends that his statements were inadmissible as the fruits of an illegal arrest. The legality of that arrest cannot, as earlier noted, be determined from the record since the only information on the issue is the testimony of Officer Soil that he and Blackley picked up respondent on the basis of information left for them by the day-watch officers. The State's failure to present other evidence concerning the arrest obviously resulted from respondent's failure to raise the issue in the trial court. We hold that, in such circumstances, the issue has been waived and cannot be raised for the first time on appeal. (*People v. Nilsson* (1970), 44 Ill.2d 244.) In this situation respondent's argument based on *People v. Brown* (1974), 56 Ill.2d 312, *rev'd*, *Brown v. Illinois* (1975), --- U.S. ---, 45 L. Ed. 2d 416, 95 S. Ct. 2254, is inapposite.

"The determination of the question whether or not a confession is voluntary depends not on any one factor, but upon the totality of all the relevant circumstances." (*People v. Johnson* (1970), 44 Ill.2d 463, 468.) That determination is to be made initially by the trial court, and its finding will not be disturbed on review unless it is contrary to the manifest weight of the evidence. (*People v. Higgins* (1972), 50 Ill.2d 221.) Respondent's claims of physical abuse are unsupported by any other evidence in the record, even the testimony of his mother. As to the existence of the other factors alleged to have rendered respondent's confession involuntary, no dispute exists.

Despite his youth, respondent was not a stranger to the criminal justice system. He had been referred to the juvenile court in 1970 for obstruction of justice and also had on his record several station adjustments for curfew violations and aggravated battery with a gun. Respondent was doing well in high school; as nearly as can be determined from the record, his communicative skills and intelligence appeared normal. Although the police practice of leaving suspects handcuffed in a chair all night cannot be condoned, respondent was not interrogated or harassed by police officers during the night and was able to sleep off and on. His mother was contacted shortly after he was taken into custody, but chose not to come to the station until the next afternoon. She was then allowed to speak with respondent on several occasions prior to his written statement. Even though respondent had been in custody about 26 hours at the time of the written statement, he had orally admitted his participation in the crime within 16 hours of being taken into custody, much of which was spent alone in the interrogation room without interrogation or harassment. While respondent was fed only twice during the 26-hour detention, he was taken into custody after dinnertime on May 25, and no reason would normally exist to offer food in those circumstances. He had been fed within just a few hours of his oral confession

at the scene of the crime, having been offered food at 7:30 a.m. on the 26th and given what he requested. Although he did not lunch during that day, there is no indication that he requested food and was refused. Respondent did not initiate the request for food that evening but was asked by Officer Hensley if he was hungry and again received the food he requested. He was repeatedly informed of his constitutional rights and his waiver of those rights is uncontroverted. He had ample opportunity to complain of mistreatment to his mother or Assistant State's Attorney Gervasi when giving the statement but did not do so, and his statement specifically denies that he had been mistreated or coerced into giving the statement. After a full consideration of the totality of the circumstances surrounding respondent's confession, we believe the trial court's finding that it was voluntarily given is clearly not contrary to the manifest weight of the evidence.

"This court has consistently held that when the voluntary nature of a confession is brought into question by a motion to suppress, the State must produce all material witnesses connected with the taking of the statements or explain their absence." (*People v. Armstrong* (1972), 51 Ill.2d 471, 475-476.) Neither Assistant State's Attorney Gervasi nor Officer Blackley testified at the hearing on the motion to suppress. After respondent presented his evidence, the State explained to the trial judge that Gervasi was prosecuting another case and Blackley was testifying in another court. Respondent contends that both men were material witnesses on the question of voluntariness and, since the excuse for their absence was inadequate, the State violated the "material witness" rule and the trial court erred in not suppressing respondent's confession.

Respondent made no claim of coercion at the time his written statement was taken, but did claim that he was in fear of further physical abuse by Officers Hensley and Deloughry if he refused to give the statement. This court

has interpreted the "material witness" rule to mean that "where there was no claim of coercion at the time a written confession was executed, but only the claim by the defendant that he was in fear of further beatings, the State [is] not required to call all of the witnesses present at the time the defendant signed the confession." (*People v. Golson* (1965), 32 Ill.2d 398, 402; see also *People v. Joe* (1964), 31 Ill.2d 220; *People v. Freeman* (1962), 25 Ill.2d 88; and *People v. Sims* (1961), 21 Ill.2d 425.) Assistant State's Attorney Gervasi was not present when the alleged coercive tactics used by police to procure respondent's statement are said to have occurred, nor did respondent complain to him of any abuse by police officers. Under these circumstances, he was not a material witness and the State was not required to produce him at the suppression hearing or explain his absence.

The situation as to Officer Blackley is not as easily resolved, at least in part due to the confusion created by respondent. Although our Code of Criminal Procedure requires that a motion to suppress "be in writing and state facts showing wherein the confession is involuntary" (Ill. Rev. Stat. 1971, ch. 38, par. 114-11(b)), respondent's written motion alleged only that "any statements elicited from him were the direct or indirect result of either physical or mental coercion and were therefore involuntary." That failure to state the facts clearly created difficulty for the State in determining initially just who were the material witnesses on the question of voluntariness, as indicated by the assistant State's Attorney in the trial court. Thus uninformed of the facts relating to any physical or mental coercion, the State presented witnesses who accounted for the entire time respondent was in custody until giving the written statement, but did not produce all persons who had contact with respondent during that period of time. Even after respondent's testimony at the suppression hearing, Officer Blackley's status was not entirely clear. On direct examination,

respondent stated that Officer Soil's partner had "hung him up" on the evening of May 25, but did not identify that partner. There is no question that Officer Blackley was in fact Officer Soil's partner that evening, but considering the confusion displayed by respondent throughout the record as to which officers were present at various times, it is not entirely certain that respondent meant Officer Blackley when he said Soil's partner hung him up, and, in any event, on cross-examination respondent indicated that it was actually Officer Soil who had hung him over the window bar. The trial judge concluded that respondent "said Soil hung him up."

Whether the case should have been continued until Officer Blackley's testimony in another trial had been concluded, as suggested to the trial court by the State, is further complicated by defense counsel's statements to the trial judge. The Code of Criminal Procedure requires that "Objection to the failure of the State to call all material witnesses on the issue of whether the confession was voluntary must be made in the trial court." (Ill. Rev. Stat. 1971, ch. 38, par. 114-11(d).) After the State had informed the court that Assistant State's Attorney Gervasi was prosecuting another case and Officer Blackley was testifying in another court, respondent's counsel made the following remarks:

"When you say he is prosecuting at 26th and California, to me, that is a valid excuse.

If he is testifying, two days of testifying is very questionable. If he is testifying in another Branch, that, to me, is a good excuse."

The appellate court concluded that these statements, made to the court in the context of a discussion of the necessity of producing the officer and the Assistant State's Attorney, constituted a waiver of any objection to the absence of Officer Blackley, pointing out that had an unequivocal objection been made, the trial judge would have ruled thereon and the State would have had an

opportunity to produce any other witnesses deemed by the court to be material.

While it would have been preferable to have had the benefit of Officer Blackley's testimony, we do not regard its absence, in the circumstances of this case, as reversible error. Given the lack of specificity in the motion to suppress and the resulting inability of the State to determine in advance of respondent's testimony which of its witnesses would be essential, the uncertainty whether Officer Blackley was even present at the time of the alleged coercion, the State's explanation of his absence and expressed willingness to call any witnesses deemed necessary by the court if a continuance were allowed, together with the equivocal nature of defense counsel's comments regarding Officer Blackley's absence, we believe the trial court's action was not unreasonable.

The judgment of the appellate court is accordingly affirmed.

Judgment affirmed.

MR. JUSTICE GOLDENHERSH, dissenting:

I dissent. I fail to perceive how the majority can acknowledge the extent of the mistreatment to which the respondent was subjected, and despite that fact, hold that the question of the illegal arrest was waived. In *Muscarello v. Peterson*, 20 Ill.2d 548, an action seeking to recover damages for personal injuries suffered by a minor, the court, finding that there was "gross misconduct" on behalf of an insurance carrier, said "The court has a duty to see that the rights of an infant are adequately protected, and is bound to notice substantial irregularities even though objections are not properly presented on its behalf." (20 Ill.2d 548, 555.) The "gross misconduct" to which the *Muscarello* court referred was the alteration of a medical report. The irregularity which the majority here holds was waived was the illegal arrest of a 16-year-old defendant. In view of the fact that respondent's statements are "the only

evidence directly implicating him in the killing," the rule of *Muscarello* should certainly apply in this case.

Concerning the illegal arrest and the treatment accorded this boy prior to his confession, the appellate court said: "This evidence establishes that the respondent was illegally detained, ***. The evidence also establishes that the respondent was held overnight seated in a chair and handcuffed to a wall, disclosing a police procedure which is to be severely condemned." *In re Lamb*, 21 Ill. App. 3d 827, 835.

The majority states "Although the police practice of leaving suspects handcuffed in a chair all night cannot be condoned, respondent was not interrogated or harassed by police officers during the night and was able to sleep off and on." 61 Ill.2d at 388.

In *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428, after holding that the constitutional privilege against self-incrimination was applicable in the case of juveniles, the Supreme Court said: "We appreciate that special problems may arise with respect to waiver of the privilege [against self-incrimination] by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U.S. 1, 55, 18 L. Ed. 2d 527, 561, 87 S. Ct. 1428, 1458.

Despite the fact that "prior to his initial interrogation, respondent was repeatedly informed of his constitutional rights by all police officers who questioned him ***" (61 Ill.2d at 386), and his having been given food on two

occasions, I find it difficult to rule out the possibility that the statement was the product of the "fright or despair" suggested by *Gault*.

The judgment should be reversed and the cause remanded for a new trial and the circuit court should be directed to consider the voluntariness of respondent's statements in the light of *Brown v. Illinois*, --- U.S. ---, 45 L. Ed. 2d 416, 95 S. Ct. 2254.

SCHAEFER and WARD, JJ., join in this dissent.
